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No. 80-0001

In The

Supreme Court of the United States

October Term, 1980

ANNA STANTON GREEN,

Petitioner,

vs.

ELIOT BARTHOLOMEW, ROBERT KLIPSTEIN, P. RAYMOND SIRIGNANO, PHILIP E. PUGSLEY, HARRY MOOREHEAD, JOSEPH CALIFANO, COMMISSIONER OF THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, AND THE UNITED STATES POST OFFICE, AND THE NEW YORK BANK FOR SAVINGS,

Respondents.

On Petition For a Writ of Certiorari to the United States Court of Appeals For the Second Circuit

BRIEF FOR RESPONDENTS ELIOT BARTHOLOMEW AND ROBERT KLIPSTEIN IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Was it a violation of the constitutional rights of Mrs. Green, the petitioner, under the First, Thirteenth or Fourteenth Amendments, for the Supreme Court of Westchester County, New York, to consider competent psychiatric testimony in determining whether a conservator was needed?

2. Did the District Court rightly determine (and thus the Court of Appeals rightly affirm) that the conservatorship proceeding comported with the due process requirements of the Fourteenth Amendment?

3. Did the conduct of respondents Bartholomew and Klipstein, in seeking the appointment of a conservator for Mrs. Green, constitute a violation of 42 U.S.C. §§1983 or 1985, the Civil Rights Law, or of 18 U.S.C. §1961, *et seq.*, the Racketeer Influenced and Corrupt Organizations Chapter of the Organized Crime Control Act of 1970 ("RICO")?

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COUNTERSTATEMENT OF THE CASE

Fact Statement[1]

This brief is submitted on behalf of respondents Eliot Bartholomew and Robert Klipstein, Esq. Bartholomew, a seventy-six year old retired businessman, was appointed Mrs. Green's conservator by the Supreme Court, Westchester County ("state court") on February 10, 1978 (Sirignano Judgt.; 40a-41a). Klipstein, as a partner in the law firm of Danziger, Bangser & Klipstein, represented Bartholomew in the conservatorship proceedings in state court (Klipstein Answer, par. 10; 164a-165a).

Background of the Dispute

Mrs. Green is ninety-four years of age. Her daughter (now deceased) was married to Bartholomew (Bart. Aff., Oct. 16, 1978; 58a).

For many years prior to the summer of 1977, Mrs. Green lived alone in a slum neighborhood. With the passage of years, she suffered badly impaired eyesight and became physically feeble (Moorehead psychiatric exam.; 120a-122a). Notwithstanding his wife's death in 1967, Bartholomew continued to minister to Mrs. Green's shopping needs, to prepare her tax returns, and to take care of her banking and financial needs. On occasion, he was accompanied by Arthur Grundig, a nephew of Mrs. Green (Bart. Aff., Oct. 16, 1978, 61a-62a; Bart. Aff., Dec. 16, 1977, 112a-113a).

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1. The appendix in the United States Court of Appeals for the Second Circuit has, at petitioner's request, been certified and delivered to this Court. Frequent references are made in this Fact Statement to affidavits of respondents Bartholomew and Moorehead included in the appendix. Such references will be followed by the date of the affidavit and the appendix page on which the appropriate portion appears, thus: "Bart. Aff., Oct. 16, 1978, 61a." Respondent Sirignano rendered decisions dated January 27, 1978 and June 29, 1978, and a judgment dated February 10, 1978. These will be referred to as "Decision No. 1," "Decision No. 2," and "Judgt.", respectively.

In the summer of 1977, Mrs. Green injured herself. She telephoned Bartholomew for help and he placed her in a hospital (Bart. Aff., Oct. 16, 1978; 61a). When Bartholomew visited Mrs. Green's apartment a day or two later, he found that it had been stripped by vandals; it thus became impossible for Mrs. Green to return to it (*id.*, 62a).

Upon her release from the hospital, Bartholomew placed Mrs. Green in the family home of neighbors. After two weeks, he was advised that she was too burdensome to be kept on (Bart. Aff., Oct. 16, 1978; 62a). Mrs. Green herself refused to enter a nursing home; so on October 6, 1977 Bartholomew took her into his own one-bedroom apartment (*id.*). Because these arrangements became increasingly intolerable, Bartholomew petitioned the state court for his appointment as Mrs. Green's conservator, in accordance with Article 77 of the New York State Mental Hygiene Law [Bart. Rule 9(g) statement; 50a].

Proceedings in State Court

The state court petition (reproduced in full at 77a-83a) was supported by the affidavit of a psychiatrist who, in addition to recording his own opinion that Mrs. Green was in need of a conservator, set forth also the like opinion of a clinical psychologist, who had also examined Mrs. Green (84a-85a).

By supplemental affidavit (88a), Bartholomew accounted for his previous management of Mrs. Green's assets and waived any commission or other compensation, if appointed (Bart. Aff., Dec. 5, 1977, pars. 2 and 5; 88a, 90a).

The order to show cause and petition were presented to respondent Sirignano, the state court judge assigned to consider such applications. In accordance with the requirement of the Mental Hygiene Law and the order to show cause, due notice of the commencement of the proceeding was served upon Mrs. Green and all of her known kin (Order to

Show Cause, Bart. Aff., Oct. 16, 1978, par. 11; 63a). The order to show cause also named John M. Perone, Esq., a lawyer, as guardian *ad litem* for Mrs. Green (Order, 75a-76a).

Mr. Perone's sworn report (92a, *et seq.*) corroborated the observations of Bartholomew and the medical and psychological opinions referred to; reviewed and approved Bartholomew's account for Mrs. Green's funds; and recommended the appointment of Bartholomew as Mrs. Green's conservator (*id.*, 95a-100a). He also reported that she did not herself wish to attend the hearing (*id.*, 99a).

Following notice of the proceeding, Grundig appeared and by affidavit declared that he (Grundig) should be appointed conservator instead (101a-102a). An issue having thus been created, Justice Sirignano deferred action on the petition (117a, *et seq.*), and appointed respondent Harry Moorehead, M.D., a psychiatrist practicing in White Plains, as an independent expert to examine Mrs. Green:

> ". . . to assist [the state court] in determining whether a Conservator of the property of [Mrs. Green] should be appointed . . ." (*id.*).

In accordance with that assignment, Moorehead examined Mrs. Green (Moorehead report, 120a). He also consulted with Stuart Pines, M.D., a physician who had recently examined Mrs. Green (*id.*). Dr. Moorehead found her to be:

> "Suffering from a deteriorating mental condition which comes about as a result of a cerebral atrophy and diminished circulation to the brain. This process has resulted in mental confusion, misinterpretation of environment, with the development of auditory and visual hallucinations . . . [T]his condition is progressive and would appear to have accelerated in recent months" (*id.*, 122a).

He concluded that she was not capable of caring for her personal property, and recommended that she be cared for in a nursing facility (*id.*).

After a further plenary hearing (37a), Justice Sirignano decided that need for a conservator had been established "by clear and convincing proof" (*id.*). By Decision No. 1, he appointed Bartholomew as conservator upon his filing a bond in a sum in excess of value of the assets involved, and directed that the judgment thereon provide for Mrs. Green to continue in the nursing home in which the state court had already approved her placement, until further order of the court (37a-38a). Judgment was duly entered (39a-41a), Bartholomew having bonded his conservatorship as directed (354a-355a); Mrs. Green's bank accounts were duly changed by Bartholomew into conservatorship accounts [Bart. 9(g) statement, par. 32; 55a]; and he notified the Social Security Administration to send Mrs. Green's benefit checks to him as her conservator [Bart Aff., Oct. 16, 1978, par. 5(e) and (f); 60a]. Later, on June 15, 1978, Bartholomew and Klipstein filed Mrs. Green's will with respondent Philip E. Pugsley, the clerk of the Surrogate's Court, Westchester County, acting in accordance with provisions and rulings under New York law which mandate or encourage a conservator or committee to file the will of a ward with the clerk of the Surrogate's Court for safekeeping (Klipstein Aff., Oct. 3, 1978; 190a).

Since assuming the responsibility of conservator, Bartholomew has duly provided for the maintenance, support and personal well-being of Mrs. Green; and has duly filed the annual accounting for 1978 required of him by the Mental Hygiene Law with respect to his stewardship (279a).[2] He has maintained Mrs. Green in the nursing home designated by Justice Sirignano, at which residence she is cared for in comfort

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2. Subsequent to the issuance of the opinion below, Bartholomew filed his annual accounting for 1979.

and given unrestricted access by visit, telephone and mail to any person with whom she wishes to have concourse (Magi Aff., June 5, 1979, *passim;* 283a).

At some point following entry of the judgment, Grundig apparently introduced Mrs. Green to Gene Crescenzi, Esq., her lawyer of record in all federal court proceedings (Bart. Aff., Oct. 16, 1978, par. 19; 66a). With Mrs. Green's alleged support, her attorney procured the issuance of an order to show cause directing a new hearing as to whether Bartholomew's conservatorship should continue (126a). As a preliminary to the new hearing, Justice Sirignano requested Moorehead once again to examine Mrs. Green; that reexamination occurred June 24, 1978 (Decision No. 2; 45a).

The new hearing occurred June 27, 1978. Moorehead appeared and testified, and was cross-examined by Mrs. Green's attorney. Mrs. Green appeared and testified under examination by her attorney; she was further examined by both the court and Klipstein. Bartholomew also testified, and was cross-examined by Mrs. Green's attorney (Bart. Aff., Oct. 16, 1978, par. 23; 67a). No proofs of any kind, medical, psychiatric or otherwise, were tendered on Mrs. Green's behalf, other than her own testimony.

On June 29, 1978, Justice Sirignano issued Decision No. 2, denying the application in its entirety. He commented on Mrs. Green's own demonstrated lack of comprehension at the hearing; and affirmatively determined "that the Conservatee is still unable to care for herself and her property, and, accordingly, denie[d] the application to discharge the Conservator upon that ground" (46a).

Mrs. Green's attorney filed a notice of appeal to the Appellate Division of the New York Supreme Court, Second Department; but permitted that appeal to lapse for want of prosecution. Instead, on August 25, 1978, he filed the complaint in the instant action and requested issuance of the summons (District Court Docket Entry, Aa).

The Proceedings in District Court

The complaint and amended complaint charge that the respondents united in a conspiracy, by the use of psychiatric testimony, to force Mrs. Green to submit to a "religion or cult" — a "confessional faith" in violation of the First Amendment; that the determination of the need for a conservator in reliance upon any psychiatric opinion constitutes "involuntary servitude" in violation of the Thirteenth and Fourteenth Amendments, and that the court-ordered management of her property by a bonded conservator constitutes an unconstitutional deprivation thereof. Such conduct was claimed to constitute violation of 42 U.S.C. §§1983 and 1985. The claim was also raised that such conduct constituted racketeering in violation of RICO. A million dollars in damages, as well as permanent injunctions and restraints are demanded (Complaint and Amended Complaint, *passim,* 142a; 1a).

Bartholomew and Klipstein moved for summary judgment and dismissal on the pleadings.[3]

United States District Judge Robert W. Sweet rendered his opinion on January 11, 1979, granting the motions of all moving parties to dismiss and for summary judgment (Supplemental Appendix VI to petition; 211a). He held RICO inapplicable to all defendants (*id.*). As respects Bartholomew and Klipstein, he held that neither of them acted under color of state law in respect of the application for a conservatorship (*id.*). He found that, although Bartholomew was acting under color of law as an officer of the court after his appointment as conservator, Mrs. Green had failed to make any showing that she "suffered a loss of any right, privilege or immunity without due process of law." (*id.*). He found the Mental Hygiene Law to be constitutional as applied (*id.*).

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3. All parties except Moorehead moved at the same time for like relief. Moorehead made a similar motion at a later date.

Some months later, Judge Sweet issued a second opinion (Supplemental Appendix VIII to petition; 222a), granting Dr. Moorehead's motion for summary judgment. In his opinion, Judge Sweet declared:

> "The court finds that psychiatry is a bona fide aspect of the medical profession" (224a).

In both opinions, the court held that 18 U.S.C. §1961 had no applicability, and that no conspiracy had been shown to exist to deprive Mrs. Green of equal protection of the law. Judgment was entered July 3, 1979 (Supplemental Appendix X to petition). Appeal to the United States Court of Appeals, Second Circuit, followed. That court unanimously affirmed, *per curiam,* labeling the appeal as "frivolous and completely without merit" (Appendix I to petition; hereinafter "the opinion below"). Double costs were directed to be paid by petitioner's counsel, whose conduct was declared by the Court of Appeals to warrant disciplinary review. An application for rehearing, and a suggestion for *en banc* consideration, likewise met with unanimous rejection.

In seeking issuance of a writ of certiorari, accusation has also been leveled by petitioner (or her counsel) against the judges of the Court of Appeals, who are claimed to have "undeniably . . . demonstrated their own personal bias and prejudice" (petition, p. 14).

REASONS FOR DENYING THE WRIT

I.

The petition presents no issue suitable for review by this Court.

The principal contention of the petition is that psychiatry is not a bona fide medical practice, but a cult or religion (petition, p. 12); and that the employment of impartial psychiatric testimony by a state judge in passing upon a conservatorship petition was tantamount to the imposition of a religion upon her in violation of the First Amendment.

This is nonsense.

Moreover, as the procedural history of this litigation shows (*see* Statement of Facts, *supra*; and see the opinion of the Court of Appeals, Second Circuit, set forth at petition, Appendix I), petitioner has been accorded scrupulous conformity with the procedural requirements for a determination of the need for a conservator (New York Mental Hygiene Law, Article 77, *passim*); and she has, as well, been accorded repeated opportunities for hearing, review, rehearing, the testing of collateral issues, *pendente lite* relief, appellate review, and rehearing of appellate review.

We respectfully submit that, on any reasoned analysis by even the most sceptical and impartial of reviewing authorities, no grounds appear which should invoke the discretionary writ of this Court. The petition refers to no conflict between the opinion below and any decision rendered in any other court, federal or state. Nor is there any reference made to recognized authority in support of the claim that the use of psychiatric opinion to assist a court in determining mental status constitutes involuntary religious practice.[4]

4. The contention that conservatorship constitutes "involuntary servitude" in violation of the Thirteenth Amendment, as suggested by the petition, is simply theatre of the absurd.

The petition takes issue with the reference made by the Court of Appeals to the opinion in *Parham v. J.R.*, ___U.S.___, 99 S. Ct. 2493, 61 L. Ed. 2d 101 (1979). The contention is made (petition, pp. 9-10) that *Parham* "is completely irrelevant." But *Parham* is obviously relevant; since it is a case in which, as in many others, the Supreme Court has expressly identified the practice of psychiatry as a legitimate branch of medical science, and licensed psychiatrists as experts on mental health and mental illness.

In *Parham* the Court was confronted with a class action challenging, on due process grounds, Georgia's procedures for the commitment of minors to state mental institutions. While minors, to be sure, are not involved in the case at bar, all nine Justices of this Court in *Parham* explicitly recognized the validity of the role of psychiatrists and other mental health professionals in assisting judicial and other authorities to reach determinations as to mental condition. Indeed, the majority opinion is replete with references to the value of psychiatric opinion in such fact-finding.

Nor were *Parham* and its companion, *Secretary of Public Welfare of Pennsylvania v. Institutionalized Juveniles*, ___U.S.___, 99 S. Ct. 2523, 61 L. Ed. 2d 142 (1979), the only opinions issued by this Court in 1979 which gave consideration to the value of psychiatrists in assessing mental condition. In *Addington v. Texas*, 441 U.S. 418, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979), the Court reviewed the measure of proof required to support the commitment of the appellant to a state mental institution. And there, as in *Parham* and *Institutionalized Juveniles*, a unanimous Court (Justice Powell abstaining) acknowledged (a) the existence of mental illness; (b) the necessity, arising in mental condition, for the commitment of persons to institutions for care or treatment;[5] and (c) the

5. It should be noted that treatment of Mrs. Green was not involved here. No psychiatrist treated her; all that was involved was the testimony of a court-appointed psychiatrist, respondent Moorehead, based upon his interviews with Mrs. Green. *Cf., Rogers v. Okin*, 478 F. Supp. 1342 (D. Mass. 1979).

necessity of mental health professionals for the expression of opinion on mental condition:

> "Whether the individual is mentally ill and dangerous to either himself or others and is in need of confined therapy turns on the meaning of the facts which must be interpreted by expert psychiatrists and psychologists." 441 U.S. at 429.

Indeed, as the Chief Justice observed in *Addington,* the process of psychiatric diagnosis is so difficult for a "trained psychiatrist" that it may often lie beyond the capability of "even a trained judge" to achieve without the help of psychiatric opinion. *Id.,* at 430.

We entertain no doubt that, with a modicum of effort, we could adduce opinions from the highest court of every state and from each United States Court of Appeals, in which explicit recognition has recently been given to the viability of competent and impartial psychiatric testimony as a tool in making decisions involving mental condition. If there has never been a case in which an effort was made to equate such assistance to (i) witchcraft; (ii) commitment to involuntary servitude; or (iii) racketeering, it is because so far-fetched a set of contentions has never crossed the mind of counsel before.

Passing reference is made in the petition [Questions Presented, No. 2(b)] to violation of the Fourteenth Amendment. No other expression has been given by the petition to the charge that Mrs. Green was denied the full panoply of procedural protections to which she was entitled before appointment of a conservator, and in the hearing which reaffirmed the continuing necessity for one. The opinion below reviewed those procedural safeguards, which included, among other things, the appointment of a guardian *ad litem,* notice to relatives, the right to appear, examine and cross-examine, representation by

counsel of petitioner's choice, determinations by a "clear and convincing" standard, and the posting of bond. There can thus be no such due process issue.

* * *

A particularly ugly feature of the petition is its scandalous charge that Circuit Judges Waterman, Moore and Mansfield, who issued the opinion below, were operating upon "personal bias and prejudice" (petition, p. 14). The bases given for such charges are that (i) the Court of Appeals refused to permit petitioner's counsel to supplement the appendix with materials not a part of the record on appeal; (ii) the Court of Appeals applied *Parham* "ex post facto," and (iii) the Court of Appeals imposed double costs upon petitioner's counsel and urged the referral of his conduct to an appropriate grievance mechanism. These rulings are said to constitute departures from accepted judicial practice (*id.*).

We deplore these charges. We point out that, in the course of this wholly frivolous and outrageously prolonged litigation, petitioner's counsel has, on the record, charged virtually every judge before whom any aspect of this case was heard, in either state or federal courts, and even some judges before whom it has never appeared, with criminal misconduct or other violations of their oaths of office. Justice Sirignano has been charged with "racketeering"; Presiding Justice Frank A. Gulotta of the Appellate Division of the Supreme Court of New York State, Second Department, has been charged with prejudice in favor of psychiatrists; Hon. Robert W. Sweet, United States District Judge, has been charged with reaching his decisions for reasons of personal friendship; and the panel of the Court of Appeals has been charged with personal bias and prejudice.

We respectfully submit that, with palpably unwarranted charges of that nature on the record before it, the Court of Appeals, in imposing double costs and recommending a review by the Grievance Committee, engaged in a proper and transparently necessary effort to police its own bar.

CONCLUSION

For the reasons hereinabove stated, the petition should be denied.

Respectfully submitted,

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